

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SOPHIA S.,

Claimant,

OAH No. 2011090972

v.

WESTSIDE REGIONAL CENTER,

A Proceeding Under the Lanterman
Developmental Disabilities Services Act

Service Agency.

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Culver City on November 7, 2011. Westside Regional Center (Service Agency) was represented by Erin Fox, Fair Hearing Consultant. Sophia S. (claimant) was represented by her mother, Anisa S. A.

The Service Agency presented Exhibits 1 – 11 and the argument of the Fair Hearing Consultant. Claimant presented Exhibits A and B and the testimony of the mother and father.

At the conclusion of the hearing, claimant’s request to hold the record open for the filing of a speech therapy report was granted. On November 7, 2011, petitioner filed a report by facsimile transmission. On November 9, 2011, the Administrative Law Judge received the report, marked the report as Exhibit C, and admitted Exhibit C into evidence.

Oral and documentary evidence having been received, the Administrative Law Judge submitted this matter for decision on November 9, 2011, and finds as follows:

ISSUE

The issue presented for decision is whether claimant should receive additional sessions of speech therapy.

FACTUAL FINDINGS

1. Claimant was born on September 17, 2008, and is now three years and two months old. She lives with her parents in the family home in Los Angeles. At the age of 25 months, claimant was referred by her pediatrician to the Service Agency for services due to expressive language delays. After conducting occupational and speech and language evaluations of claimant, the Service Agency found her to be eligible for early intervention services under the Early Start Program based on her developmental delays in adaptive and self-help skills.

2. (A) On November 16, 2010, an Early Start Service Coordinator and claimant's parents convened a meeting to develop claimant's Individual Family Service Plan (IFSP). The parents were concerned about their daughter's expressive language development, for she did not say any words and communicated only by nodding her head, gesturing, and grunting. In the IFSP, claimant's cognitive development was described to be at the 18-month level. Her expressive and receptive language skills were termed delayed at 12 to 15 months and 18 to 21 months, respectively.

(B) Under her IFSP, claimant was to receive once weekly, 60-minute sessions of speech therapy and center-based services, including occupational and physical therapy, on a thrice weekly basis. Both speech therapy and the center-based services were designated as required services for claimant under the Early Start Program. The Service Agency agreed to provide funding for speech therapy if the family's private health insurance carrier denied coverage for the service. On an undetermined date, claimant began attending the center-based program at Therapy West. Later, she changed to the UCLA Early Intervention Program.

3. (A) After the IFSP meeting, the family's private health insurance company denied coverage for speech therapy and the Service Agency authorized funding for speech therapy for her under the Early Start Program. Beginning on January 17, 2011, claimant was authorized to receive once weekly, 60-minute sessions of speech therapy from Speech, Language, and Educational Associates of Studio City (Associates). In the month of January 2011, claimant received five sessions of speech therapy.

(B) In February 2011, claimant did not receive any speech therapy. Her mother could not agree with the speech therapist from Associates on the dates for the in-home sessions and she was also displeased with the consistency of the speech therapy. On February 11, 2011, claimant's mother asked the service coordinator for a different vendor for speech therapy. On or about February 23, 2011, claimant's mother agreed that the new vendor would be First Steps Developmental Services, Inc., of Los Angeles (First Steps) and the Service Agency authorized the provision of speech therapy for claimant from First Steps. In March 2011, claimant received five sessions of speech therapy provided by Dereth Trice, M.S., C.C.C.-S.L.P., of First Steps before she and her parents went out-of-town on a three-week family trip.

(C) On or about April 18, 2011, claimant returned home from the family trip and received four or five sessions of speech therapy that month. On April 28, 2011, the Service Agency increased the frequency of claimant's speech therapy sessions to nine hours per month, or twice weekly, after her First Steps speech therapist recommended that she receive more sessions to address her expressive and receptive language delays. In May 2011, claimant received nine sessions of speech therapy pursuant to her IFSP, which was reviewed and amended that month.

(D) From June 1 through 13, 2011, claimant received seven or eight sessions of speech therapy from First Steps. After June 13, 2011, and continuing until on or about July 12, 2011, she did not receive any speech therapy because the First Steps speech therapist was ill and had an illness in her family. On or about July 14, 2011, claimant's mother asked for a new vendor for speech therapy for her daughter. The mother also asked for additional speech therapy sessions. In an earlier progress note dated May 25, 2011, the First Steps speech therapist had recommended that claimant receive three sessions per week so that she could improve and develop her speech motor control.

(E) On July 14, 2011, the Service Agency approved a change of speech therapy vendor and authorized Odelia Mirzadeh of Innovative Speech and Language Pathology (Mirzadeh) to provide speech therapy to claimant, noting in its records that First Steps was unable to complete the service. On or about July 20, 2011, the Service Agency also authorized an increase of claimant's speech therapy to 13 hours per month, or three times weekly, based on the recommendation of the prior speech therapist. The Service Agency also agreed to provide claimant with behavioral intervention services.

(F) In the latter half of the month of July 2011, claimant received six sessions of speech therapy from Mirzadeh. In August and September 2011, claimant received 14 and 13 sessions of speech therapy, respectively.

4. On August 12, 2011, the Service Agency advised claimant's parents that their daughter's services under the Early Start Program would be ending on her third birthday. The parents were further advised that claimant would be evaluated for eligibility for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) and that she may also be eligible for special education services from her school district.

5. On August 18 and 23, 2011, claimant underwent a psychological evaluation by Carol Kelly, Ed. D., for the purposes of clarifying her diagnosis and to determine her eligibility for services under the Lanterman Act. The mother informed the psychologist that a recent blood screening test showed that her daughter had a micro-deletion in her gene sequence that was associated with Angelman's Syndrome. Dr. Kelly reviewed the results of previous tests, administered several psychological tests, conducted behavioral observations, and interviewed the parents. The

psychologist determined that claimant's cognitive skills are within the low average range, her communication skills are within the upper limits of the borderline range, her daily living skills are within the borderline range, and her socialization skills are at the low average range. Dr. Kelly noted the finding of the speech therapist that claimant has verbal apraxia and the approval by the Service Agency for the provision of behavioral intervention services through Autism Spectrum Therapies. On the Gilliam Autism Rating Scale-2, claimant's parents provided responses about their daughter that indicated a probability that she is not autistic. Claimant's score on the Autism Diagnostic Observation Schedule, Module I, was below the cut-off score for Autism and above the cut-off score for Autism Spectrum Disorder. From her psychological evaluation, Dr. Kelly diagnosed claimant with Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS), and Expressive Language Disorder. Due to claimant's young age and verbal apraxia, Dr. Kelly tendered her diagnosis of PDD-NOS on a provisional basis and recommended that claimant be re-evaluated in one year.

6. (A) On September 13, 2011, claimant's mother requested that her daughter's speech therapy services continue after her third birthday. The speech services were scheduled to end under the Early Start Program on her third birthday on September 17. The mother complained that her daughter did not receive her full allotment of speech therapy sessions under the Early Start Program because the two prior vendors were not able to provide the service.

(B) On or about September 15, 2011, the Service Agency denied claimant's request for additional speech therapy sessions. In addition, the Service Agency issued a Notice of Proposed Action, determining that claimant was not eligible for services under the Lanterman Act.

(C) On or about September 26, 2011, claimant's mother filed a Fair Hearing Request to appeal the denial of eligibility and to request not only more speech therapy sessions but also the applied behavioral analysis (ABA) programming that had been previously approved but never provided to her daughter.

7. On October 25, 2011, and prior to the fair hearing in this matter, the Service Agency and claimant entered into a partial resolution of the Fair Hearing Request. The Service Agency agreed that claimant was eligible for services under the Lanterman Act on a provisional basis for two years and to provide her with "compensatory" ABA services. The Service Agency scheduled an Individual Program Plan meeting to discuss services for claimant. When she turns five years old, claimant will be re-evaluated for continued eligibility under the Lanterman Act. The fair hearing on November 7, 2011, proceeded on the sole issue of whether claimant should receive additional speech therapy sessions based on her claim that she did not receive all of her authorized speech sessions under the Early Start Program in the last few months.

School Services

8. (A) On March 10, 2011, the Service Agency duly convened a transition meeting for claimant, advising her mother that services under the Early Start Program would cease on her daughter's third birthday and giving her a copy of the procedural safeguards. Claimant's mother agreed to a Special Education Assessment Plan with the Los Angeles Unified School District (school district), acceding that her daughter could be placed in a preschool or special education program if found eligible for special education services and supports.

(B) Following an assessment by the school district, claimant was found eligible for special education services and supports due to autism. The school district also found that claimant needs speech and language services so that she is able to derive a benefit from the special education program. Following an Individualized Education Program meeting on July 20, 2011, the school district offered to provide claimant with placement and services at the Kids Intensive Therapy (KIT) Center which is an intensive preschool setting. The KIT Center offers instruction and services in small collaborative groups. Each group is comprised of a maximum of eight pupils and has a ratio of one adult for every two pupils. The program at the KIT Center provides intensive early intervention services by a team of specialists, including early childhood special education teachers who are trained in behavior intervention and speech and language, and behavior interventionists. Behavior intervention, ABA strategies, and speech and language therapy are provided in an integrated manner.

(C) On September 13, 2011, claimant's parents accepted the offer of placement and services at the KIT Center for their daughter, but disagreed with the sufficiency of the speech and language services there. The parents believe that claimant needs individual speech therapy for at least 40 minutes every day; the speech therapy that she would receive from the school district at the KIT Center would only be for only 15 to 20 minutes per day and would be with another pupil.

9. In September 2011, claimant began attending the KIT Center and is doing well there, except in the area of speech and language. Her parents have found that their daughter's speech has not developed while attending the KIT Center. The parents are seeking individualized speech therapy for her from the school district through a due process proceeding. In the meantime, the parents are paying for their daughter to continue receiving private speech therapy from Mirzadeh. Since September 2011, petitioner has received one or two sessions of individual speech therapy each week from Mirzadeh.

10. As set forth in her Speech and Language Therapy Report dated September 12, 2011, Mirzadeh has been providing speech therapy to claimant three times weekly. At the start of speech therapy, claimant's main means of communication were crying, pointing, and using signs minimally. She had limited vocalization and communication intent and presented with moderate oral apraxia of

speech. Mirzadeh has sought to teach claimant how to make age-appropriate speech sounds, use sign language, increase imitation of sounds and words, and answer “WH” questions. Claimant has partially met her goal of producing age-appropriate speech sounds. She has learned more sign language, can follow one-step simple commands, and is able to answer “WH” questions about 60 percent of the time with prompting. Claimant still requires maximum prompting and presents with moderate oral motor deficits. Mirzadeh has recommended that claimant continue to receive speech therapy three times weekly in order to address and improve her articulation and phonological processing skills.

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1, Introduction--For approximately nine months in 2011 before she turned three years old on September 17, 2011, claimant was a consumer or recipient of services, including speech therapy, under the Early Start Program. After she turned three years old, claimant filed a Fair Hearing Request filed under the Lanterman Act, requesting regional center eligibility in order to continue to receive ABA and speech therapy. Subsequently, the Service Agency found claimant to be eligible for regional center services under the Lanterman Act on a provisional basis and has decided to provide her with behavioral intervention therapy, but not speech therapy. In addition, claimant has been deemed eligible for special education services and supports but has not found the small group setting for speech therapy offered by the school district to be sufficient for her needs. In this appeal, claimant seeks 14 speech therapy sessions from the Service Agency to compensate or to make-up for the sessions that were missed or not provided to her while she was an Early Start consumer. As such, this appeal may be guided by the provisions and principles of both the Early Intervention Services Act and the Lanterman Act and the Early Intervention Services Act.

2. Under the Lanterman Act, the Legislature has decreed that persons with developmental disabilities have a right to treatment and habilitative services and supports in the least restrictive environment and provided in the natural community settings as well as the right to choose their own program planning and implementation. (Welf. & Inst. Code, § 4502.)

Services and supports for persons with developmental disabilities means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability or toward the achievement and maintenance of independent, productive, normal lives. (Welf. & Inst. Code, § 4512, subd. (b).) Services and supports may include behavior training and speech therapy. (*Ibid.*)

The Legislature has further declared regional centers are to provide or secure family supports that, in part, respect and support the decision making authority of the family, are flexible and creative in meeting the unique and individual needs of the families as they evolve over time, and build on family strengths and natural supports. (Welf. & Inst. Code, § 4685, subd. (b).) Services by regional centers must be provided in the most cost-effective and beneficial manner (Welf. & Inst. Code, §§ 4685, subd. (c)(3), and 4848, subd. (a)(11)) and must be individually tailored to the consumer (Welf. & Inst. Code, § 4648, subd. (a)(2)).

Further, Welfare and Institutions Code section 4648, subdivision (a)(8), provides that the regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving funds to provide those services. Section 4659, subdivision (a)(1), directs regional centers to identify and pursue all possible sources of funding for consumers receiving regional center services. Section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate. In addition, regional centers must take into account the consumer's need for extraordinary care, services, and supports and supervision.

3. Under the Early Intervention Services Act (Gov. Code, §§ 95000 et seq.), the Legislature has declared that early intervention services are to maximize the ability of families to better provide for infants and toddlers with disabilities. Early intervention services should support and enhance the family's capability to meet the special developmental needs of their infant or toddler with disabilities. (Gov. Code, § 95001, subs. (a)(2) and (3).) The Legislature has also decreed that infants and toddlers with disabilities and their families must be provided with services in the most natural environment and include the use of natural supports and existing community resources. (Gov. Code, § 95001, subd. (b)(6).)

Each infant or toddler eligible for early intervention services must have an IFSP, which includes a statement of the specific early intervention services necessary to meet his or her unique needs. (Gov. Code, § 95020, subs. (a) and (d)(5).) Each service to be provided to an infant or toddler must be identified and designated in the IFSP. (Gov. Code, § 95020, subd. (e).)

Regulations under the Early Intervention Service Act define early intervention services as those services designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant's or toddler's development and includes speech and language services. (Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).) The regulations further provide that a regional center as well as a local education agency shall arrange, provide, or purchase early intervention services required by the IFSP as soon as possible. (Cal. Code Regs., tit. 17, § 52016, subd. (d).) A regional center service coordinator must continuously seek the appropriate services and service providers necessary to enhance the development

of each infant or toddler being served for the duration of the infant's or toddler's eligibility. (Cal. Code Regs., tit. 17, § 52121, subd. (a)(6).)

Further, a local education agency shall provide special education and related services to eligible children at age three. (Cal. Code Regs., tit. 17, § 52112, subd. (a).) A regional center may continue providing or purchasing services for a preschooler who has been determined eligible for regional center services until the beginning of the next school term after the toddler's third birthday during a period when the local education agency's special education preschool program is not in session and when the multidisciplinary team determines that services are necessary until the local education agency's special education program resumes. (Cal. Code Regs., tit. 17, § 52122, subd. (f).)

Under case law, where a regional center has failed to provide adequate services and the parents must fill the void by obtaining appropriate services themselves, reimbursement to the parents may be the proper remedy. (*School Committee of Burlington v. Dept. of Ed. Of Massachusetts* (1985) 471 U.S. 359; *Florence County School Dist. v. Carter* (1993) 510 U.S. 7.) Compensatory services may be available under the Early Intervention Services Act even when the infant or toddler has turned three years old if the regional center has unlawfully deprived the consumer of those services. (See *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.* (1985) 471 U.S. 359; *Pihl v. Massachusetts Dep't of Educ.* (1st Cir. 1993) 9 F.3d 184, 188-190.)

4. Discussion— In this appeal, claimant contends that she should receive 14 additional individualized one-hour speech therapy sessions from the Service Agency as compensatory services because she did not receive five sessions in February 2011, and nine sessions in June and July 2011. Claimant asserts that, in February 2011, she asked for a new speech vendor and the Service Agency did not promptly change her speech vendor. In June and July 2011, claimant argues that she did not receive speech therapy due to the illnesses of the speech therapist and the speech therapist's family and the Service Agency did not approve another change in the speech vendor for one month.

Here, the preponderance of the evidence did not demonstrate that the Service Agency unlawfully deprived claimant of speech services in 2011. In both February 2011 and June and July 2011, the Service Agency did not take undue amounts of time to change speech vendors at claimant's requests. In fact, the Service Agency changed vendors fairly promptly, provided claimant with speech therapy pursuant to her IFSP, and increased the frequency of speech therapy sessions in response to recommendations of the speech vendors. On the other hand, after the initial IFSP meeting on November 16, 2010, at which time it was determined that claimant should receive speech therapy as a required service, the Service Agency did not begin to provide claimant with speech therapy until on or about January 17, 2011. A two-month delay in providing speech therapy, which was an early intervention service required by the IFSP, cannot be considered to have been arranged, provided,

or purchased as soon as possible. Based on this delay in first providing speech therapy, claimant is entitled to receive seven additional one-hour individualized speech therapy sessions as a compensatory service while she transitions to receiving speech therapy from her school district and regional center services under the Lanterman Act.

5. Grounds exist under the Lanterman Act to grant, in part, claimant's request for additional speech therapy sessions, based on Findings 1- 10 and Legal Conclusions 1 – 4 above.

Wherefore, the Administrative Law Judge makes the following Order:

ORDER

The appeal of claimant Sophia S. from the determination of the Westside Regional Center to deny additional speech therapy sessions is granted, in part. Claimant Sophia S. shall receive seven additional hours of individualized speech therapy.

Dated: November 28, 2011

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5. Both parties are bound by this decision and either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.